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The Dual Purposes of the U Visa Thwarted in a Legislative Duel

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THE DUAL PURPOSES OF THE U VISA THWARTED IN A LEGISLATIVE DUEL

JAMIE R. ABRAMS*

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I. INTRODUCTION

Rose¹ left El Salvador in her early 20s to come to the United States. She left everyone that she loved in El Salvador. She gave all her money to a trafficker who transported her over the United States-Mexico border in the back of a truck.

She found work as a cleaning woman in Fairfax, Virginia. She traveled over an hour each way to get to her job site because no employer closer to her home would hire her without immigration papers verifying her legal status.

Rose met a man named José and they began dating. She eventually moved in with José. Several months into their relationship she became pregnant. During Rose's pregnancy, José's brother, Jorge, was kicked out of his marital home after abusing his wife. Jorge came to live with Rose and José. Jorge almost immediately began abusing Rose when José was not home. Some of the abuse was psychological, calling her a whore, a prostitute, and worse. He repeatedly threatened to report her to immigration. Some of the abuse was physical. In one particularly violent episode, Jorge threw Rose to the ground during the second trimester of her pregnancy and began kicking her repeatedly in her abdomen while shouting obscenities at her. Rose fled to her neighbor's house. Her neighbor called the police and took her to the hospital to treat Rose's abdominal injuries and examine the fetal health.

After Rose pursued criminal charges against Jorge, José left Rose and ended their relationship. After several court appearances, Rose testified in the criminal trial against Jorge a few months before her baby was born. At every court appearance, she burned goodwill with her employer, lost wages, and faced both José and Jorge, which terrified her. José stalked her on her way to the trial at which she was supposed to testify against Jorge and threatened her not to testify.

Jorge was not convicted. Rose does not know why not. She does not understand much of what happened at the trial. She speaks no English.

While the hospital initially suspected that she might miscarry, Rose's son survived and thrived. He was born healthy and strong a few months after the

1. The author fondly dedicates this article to "Rose." Rose is a former client whose spirit and strength are truly inspiring. Representing Rose along with a team of talented and committed pro bono lawyers was truly inspiring and empowering. It is the author's hope that Rose's story, and the thousands of petitioners like her, reveal and illuminate the complexities that U visa petitioners face to catalyze change.

trial. Rose delivered him in a lonely hospital room. No family or friends supported her. The first person to hold Rose's son was her U visa lawyer who went looking for her after her phone was disconnected. None of Rose's family has met her son. He is currently five. The first picture that Rose's family in El Salvador saw of him was taken as a duplicate passport photo in connection with her U visa petition at a local Ritz Camera.

During a visitation of his son at Rose's apartment, José raped Rose while their son cried in the room. Rose subsequently obtained an order of protection against José.

The story of Rose and the legal progression of her U visa case, reveal how regulatory and legal developments over the past nine years have collectively thwarted the dual purposes of the U visa framework that Congress intended—to both strengthen law enforcement's pursuit of domestic violence cases and to protect victims.² U visas allow undocumented nonimmigrants who are victims of certain qualifying crimes to petition for lawful status if they cooperate in the investigation or prosecution of the criminal activity, as certified by law enforcement personnel. Petitioners with exactly the same circumstances as Rose would experience very different outcomes depending only on the jurisdiction of the crime. If Rose lived in the District of Columbia or Cook County, Illinois, for example, she might experience the successful prosecution and conviction of her assailant, thus protecting her and other would-be victims from future violence. After cooperating in the investigation or prosecution, she might then successfully petition the United States Citizenship and Immigration Services ("USCIS") for a U visa. If granted, the U visa would give her lawful status, employment authorization, and family unity, which in turn might ease many of the social and economic challenges that she had faced previously while living as an undocumented immigrant in the United States. Fortunately for Rose, this is the general path that her U visa petition took.

If Rose had lived in Maricopa County, Arizona, however, she might have never even called the police because she would fear that the responding officers would be forced to report her to federal immigration officials if they learned of her undocumented status, thus remaining undocumented and victimized by violence. If Rose had lived in Charlotte, North Carolina, she might have participated in the investigation and prosecution of the crime committed against her. She might then have approached law enforcement to sign a Law Enforcement Certification ("LEC" or "certification"), only to have the officer refuse to sign the LEC because the officer concluded unilaterally that she should not receive immigration relief. Officers in other jurisdictions might have decided not to sign the LEC because Jorge was not convicted. Refusing to sign her LEC for any reason would defeat her U visa petition

2. See *infra* note 18.

entirely. These representative scenarios reveal how the existing U visa framework, which positions law enforcement as the gatekeeper to U visa relief, yields inconsistent results depending only on the jurisdiction of the crime. Inconsistent results are problematic at best and unjust at worst for immigrant victims of domestic violence.

Part II of this article reviews the background of the U visa framework, considering why and for whom Congress created the U visa classification and the role of the certification in the petition.³ It explains how the law enforcement certification process is unique in its threshold significance to the U visa as an antecedent to petition USCIS for U visa relief.⁴ Congress legislated that each petitioner must obtain a certification from law enforcement that she “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of the [qualifying] criminal activity⁵ The law enforcement officer checks “yes” or “no.” With the simple check of a box, law enforcement personnel can give immigrant petitioners the opportunity to apply for U visa immigrant relief.⁶ Law enforcement personnel checking the “no” box legally defeat the victim’s U visa petition, unless the petitioner can

3. While this article focuses on domestic violence committed against immigrant women, eligibility for the U visa nonimmigrant classification is not limited to women or to domestic violence victims. 8 U.S.C. §§ 1101 *et seq.* (2006) (legislating eligibility requirements for U visa nonimmigrant classifications that are gender neutral and encompass a wide range of crimes, including rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, hostage situations, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, and related crimes).

4. 8 U.S.C. § 1184(p)(1) (2006) (“The petition filed by an alien . . . shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge or other Federal, State, or local authority investigating criminal activity Th[e] certification shall state that the alien ‘has been helpful, is being helpful, or is likely to be helpful’ in the investigation or prosecution of the qualifying criminal activity.”); *see also* Micaela Schuneman, Note, *Seven Years of Bad Luck: How the Government’s Delay in Issuing U-Visa Regulations Further Victimized Immigrant Crime Victims*, 12 J. GENDER RACE & JUST. 465, 480 (2009) (stating that U visa applicants must provide the certification Form I-918 to petition for relief). In contrast, for example, the T visa for victims of trafficking has a bypass procedure to prove cooperation through other means. *See* 8 C.F.R. § 214.11(h) (2009) (outlining the permissive language of the T visa strongly preferring the law enforcement certification, but accepting secondary credible evidence); *see also infra* Part IV.B. for a comparative discussion of the T visa framework.

5. § 1184(p)(1); *see also* U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEPT. OF HOMELAND SEC., INSTRUCTIONS FOR FORM I-918 (Aug. 31, 2007), <http://www.uscis.gov/files/form/i-918instr.pdf> (listing this certification as a component of the petitioner’s prima facie case and stating that “this certification is required; if you fail to submit a properly completed certification with your Form I-918, the petition may be denied.”) [hereinafter Instructions for Form I-918].

6. *See* § 1101(a)(15)(U) (legislating eligibility requirements for U visa nonimmigrant classification).

find another fate holding law enforcement officer to check “yes.” Part II shows how the U visa regulations—promulgated seven years after the statute was enacted—formalize a more rigid structure than Congress intended.

Part III examines how the regulatory evolution of the certification process undermines Congress’s dual purposes and thwarts the statutory framework entirely. The LEC provisions of the U visa interim final regulations irreparably shift considerable centralized power to law enforcement personnel, subjecting the process to inconsistent application and misapplication. Some law enforcement personnel and jurisdictions outright refuse to sign certifications, and others greatly increase the burden of proof on the petitioner to obtain certifications.⁷ Other personnel and jurisdictions are sensitized and trained in the nuanced complexities of domestic violence and the immigrant experience and offer a balanced, fair review of certification eligibility.⁸ This framework effectively leaves petitioners in some jurisdictions and in some cases unable to petition for U visa relief merely because of the jurisdiction of the crime and the resulting inability to get a certification in that jurisdiction.

This shift in power is magnified and compounded by the current political, legal, and social status of undocumented immigrants since the U visa classification was enacted in 2000. Most notably, local law enforcement are playing an increasing and intensifying role in enforcing federal immigration law, dramatically heightening the risks for victims of crime to report. Law enforcement leaders face new complexities in assisting victims while balancing strong competing political pressures to appear “tough on immigration.” This legal framework is problematic in any federal legislative program, but particularly in the U visa legislative scheme.⁹

Part IV recommends statutory amendments to incorporate a certification bypass procedure, following the T visa model, or alternatively, regulatory modifications to add needed flexibility to the certification procedures and restore the dual purposes that Congress intended. This article concludes that while Congress created the U visa to both help law enforcement agencies pursue criminal acts and protect victims, the certification requirement, as implemented, effectively defeats the victim protections and renders the statutory implementation focused on a singular law enforcement purpose that is not consistent with legislative intent and which is inherently unworkable.

II. THE U VISA FRAMEWORK

The U visa framework has evolved considerably since Congress first created this nonimmigrant classification nine years ago. This section traces

7. See *infra* section III (explaining how the dual purposes of the U visa are thwarted).

8. See *infra* section III (explaining how the dual purposes of the U visa are thwarted).

9. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533 (2006).

Rose's story through the U visa statutory evolution from legislative enactment, to the interim period before the regulations were promulgated, to the 2007 and 2009 interim regulations to reveal the regulatory shifts that thwart the dual purposes of the statute.

A. *Legislating Dual Purposes*

Because Rose was not married to her attacker, the Violence Against Women Act ("VAWA") did not provide her any opportunity to seek immigration relief.¹⁰ With stories like Rose's in mind, Congress created the U visa classification for immigrant victims of certain crimes in the Battered Immigrant Women Protection Act ("BIWPA") enacted as part of the Trafficking Victims Protection Act ("TVPA") in 2000.¹¹ The new classification addressed a gap left in prior VAWA legislation by offering protections to immigrant victims of domestic violence who were neither married to citizens nor lawful permanent residents.¹² U visas create a temporary lawful immigration status to protect victims of domestic violence who assist in the investigation or prosecution of criminal activity.¹³

Congress created the U visa nonimmigrant classification acknowledging the broader and more complex lived realities of immigrant women victimized by violence and recognizing that VAWA did not provide adequate protections to this population.¹⁴ Congress thus sought to give voice and protection to the

10. OFF. ON VIOLENCE AGAINST WOMEN, THE DEP'T OF JUSTICE, ABOUT THE VIOLENCE AGAINST WOMEN ACT, <http://www.ovw.usdoj.gov/vawa15.htm> (stating that VAWA was a "comprehensive legislative package focused on violence against women. . . that . . . improved legal tools and programs addressing domestic violence, sexual assault, and stalking.") (last visited April 20, 2010).

11. §§ 1501–13, 114 Stat. 1518–37.

12. *E.g.*, Karyl Alice Davis, Comment, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-Visa as a Remedy*, 56 ALA. L. REV. 557, 564 n.69 (2004) (citing Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM. U. J. GENDER SOC. POL'Y & L. 95, 163 (2001)) ("VAWA did not offer any protection to several categories of battered immigrants: those abused by citizen and lawful permanent resident boyfriends; immigrant spouses and children of abusive non-immigrant visa holders or diplomats; immigrant spouses, children, and intimate partners abused by undocumented abusers; and non-citizen spouses and children of abusive United States government employees and military members living abroad.").

13. *See* 8 U.S.C. § 1101(a)(15)(U) (2006) (legislating eligibility requirements for U visa nonimmigrant classification).

14. Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 1502, 114 Stat. 1464, 1518 (2000) (codified at 8 U.S.C. § 1101 (2000)) ("Congress finds that (1) the goal of the immigration protections for battered immigrants included in the Violence Against Women Act of 1994 was to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships; (2) providing battered immigrant women and children who were experiencing domestic violence at home with protection against

often-invisible population of immigrant women in our justice system, recognizing that immigrant women are more prone to the cycle of domestic violence because their abusers often use their undocumented status as a further weapon of abuse.¹⁵ They are also less likely to report such criminal activity because they fear deportation by law enforcement and may also distrust or misunderstand the criminal justice system for other cultural and personal reasons.¹⁶ This fear of deportation often silences immigrant women.¹⁷ Congress expressly created the U visa classification to achieve dual purposes: to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence,” and to protect victims.¹⁸

deportation allows them to obtain protection orders against their abusers and frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abuser and the abusers of their children without fearing that the abuser will retaliate by withdrawing or threatening withdrawal of access to an immigration benefit under the abuser’s control; and (3) there are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of actions by their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case under existing law.”).

15. § 1513, 114 Stat. at 1533–34 (finding that immigrant women and children are often targets of crime; these victims must be able to report crimes to law enforcement; and providing nonimmigrant visas to these victims will facilitate the reporting of crimes).

16. See 146 CONG. REC. H9029, H9041–42 (daily ed. Oct. 6, 2000) (statement of Rep. Jackson-Lee) (urging consideration of language or cultural barriers that further prevent immigrant women from being able to escape exploitation).

17. *Id.* (noting the looming threat of deportation that silences immigrant women caught in an intersection of immigration, family, and welfare laws that do not reflect their needs and life experiences); *id.* H9043 (statement of Rep. Lowey) (noting the silence, shame, and marginalization that victims affected by this bill have faced due to domestic violence). Indeed, while Rose experienced a relatively “favorable” outcome under the difficult circumstances, she did *not* call the police in response to any of the frequent acts of violence committed against her because she feared deportation. Fearing for the health and well-being of her baby, she fled to the neighbors, and it was her neighbors who called the police on her behalf while Rose sought medical treatment.

18. § 1513, 114 Stat. at 1533 (“The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(u)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.”). Expert commentary reinforces the importance of this dual purpose for petitioner advocacy: “Most importantly, practitioners must understand that the U [visa] has a dual purpose. Congress intended it both to provide humanitarian relief to victims of crime *and* to help enforcement attempting to investigate and prosecute the crimes against this most vulnerable population.” Gail Pendleton, *Winning U Visas After the Regulations*, LEXISNEXIS EMERGING ISSUES ANALYSIS, Jan. 2008, at 1, 2. Pendleton is the co-founder and co-chair of the National Network to End Violence Against Immigrant Women and Associate Director of the National Immigration Project of the National Lawyers Guild.

U visas offer immigrant victims of domestic violence access to several primary types of legal relief, including lawful status,¹⁹ employment authorization,²⁰ and family unity,²¹ supplemented by the secondary benefits of increased access to health care,²² housing,²³ higher wages,²⁴ and the protection from further domestic abuse that these primary legal protections carry.²⁵

Acknowledging the complexities of stories like Rose's, Congress plainly legislated dual purposes of the statute. Congress intended the statute to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence,"²⁶ recognizing that criminal offenders like Jorge—who abused his own wife, Rose, and Rose's unborn child—would not be prosecuted if the victims did not feel comfortable coming forward to law enforcement.²⁷ Congress intended to protect victims by providing

19. 8 U.S.C. § 1184(p)(6) (2006) (limiting the authorized period of nonimmigrant admission not to exceed four years). The statute allows for an extension of the four-year time period if a federal, state, or local law enforcement official, prosecutor, judge, or other federal, state, or local official certifies that the undocumented immigrant's presence in the United States is required to assist in the prosecution of the crime. *Id.* Additionally, the Secretary of Homeland Security may extend the time period if warranted by special circumstances. *Id.*

20. § 1184(q)(1)(A) (authorizing U visa nonimmigrants to apply for work authorization).

21. § 1184(r)(3) (authorizing certain categories of derivative U visa status for the spouse and children of adult petitioners and for the parents of minor petitioners).

22. *See generally* Seam Park, Note, *Substantial Barriers in Illegal Immigrant Access to Publicly-Funded Health Care: Reasons and Recommendations for Change*, 18 GEO. IMMIGR. L.J. 567, 574–83 (2004) (discussing the ways in which federal legislation, without immunity from deportation, leaves undocumented immigrants without reasonable access to healthcare services).

23. *See* Charu A. Chandrasekhar, Note, *Can New Americans Achieve the American Dream? Promoting Homeownership in Immigrant Communities*, 39 HARV. C.R.-C.L. L. REV. 169, 171 (2004) (noting that immigrants own a large portion of the home equity in the United States).

24. *See, e.g.,* María E. Enchautegui, *The Job Quality of U.S. Immigrants*, 47 INDUS. REL. 108, 111–13 (2008) (conducting a comparative analysis of authorized and unauthorized immigrants across twelve job-quality indicators, including wages, and finding that along all indicators examined, unauthorized immigrants scored lower than authorized immigrants, even when controlling for education levels and duration of stay); Wendy Williams, Note, *Model Enforcement of Wage and Hour Laws for Undocumented Workers: One Step Closer to Equal Protection Under the Law*, 37 COLUM. HUM. RTS. L. REV. 755, 756–57 (2006) (explaining the dynamic of exploitation between employers and undocumented immigrants and how it often drives down wages of undocumented immigrants to substandard levels).

25. *See* Amy Gottlieb, *The Violence Against Women Act: Remedies for Immigrant Victims of Domestic Violence*, N.J. LAW. MAG., Apr. 2004, at 18, 18–21 (explaining the various ways in which the immigration status of victims of domestic violence keeps non-citizens in abusive relationships); *see also* Janet Calvo, *A Decade of Spouse-Based Immigration Laws: Coverture's Diminishment, but Not Its Demise*, 24 N. ILL. U. L. REV. 153, 154 (2004) (explaining how abusers use their spouse's undocumented status as a tool of abuse).

26. § 1513, 114 Stat. 1464, 1533–34.

27. §§ 1501–13, 114 Stat. at 1518–37. Congress expressly sought to protect nonimmigrant victims of domestic violence—victims who were ineligible for relief under VAWA while their abusers lived virtually immune from prosecution. § 1502(a)(3), 114 Stat. at 1518.

humanitarian relief to victims like Rose.²⁸ For Rose, it was fear for her baby's well-being and the involvement of neighbors that led her to call the police and report the crime committed against her in this instance.

Rose must prove four threshold eligibility requirements. She must show that she "has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity."²⁹ She must "possess credible and reliable information establishing that . . . she has knowledge of the details concerning the qualifying criminal activity upon which . . . her petition is based."³⁰ She must demonstrate that she "has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which . . . her petition is based."³¹ Finally, the criminal activity must have violated a law of the United States.³² Rose's case hinged on whether she could prove that she was helpful in the investigation and prosecution of the crime, notwithstanding that Jorge's prosecution was ultimately not successful.

The statute positions the certification as an essential component of the U visa petition.³³ To apply for a U visa, petitioners must submit the Form I-918,³⁴ any other credible evidence he or she wishes to include,³⁵ and a personally signed statement describing the facts of victimization.³⁶ Congress also expressly requires U visa petitioners to provide a certification from a local, state, or federal law enforcement official verifying cooperation.³⁷

This statutory framework thus requires advocacy at two separate junctures—first to petition law enforcement to sign a certification, and second to petition USCIS for U visa relief. First, Rose had to obtain a certification from law enforcement personnel certifying that she "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of

28. § 1513, 114 Stat. at 1533 ("The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, *while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.*") (emphasis added).

29. 8 C.F.R. § 214.14(a)(14)(3)(b)(1) (2009).

30. § 214.14(a)(14)(3)(b)(2).

31. § 214.14(a)(14)(3)(b)(3).

32. § 214.14(a)(14)(3)(b)(4) (including territories or possessions of the United States, Indian country, and U.S. military facilities within the scope of the regulations).

33. 8 U.S.C. § 1184(p)(1) (2006) (stating that the LEC must show that the petitioner "'has been helpful, is being helpful, or is likely to be helpful' in the investigation or prosecution of qualifying criminal activity").

34. 8 C.F.R. § 214.14 (c)(1).

35. 8 U.S.C. § 1184(p)(4).

36. 8 C.F.R. § 214.14(c)(2)(iii).

37. 8 U.S.C. § 1184(p)(1).

qualifying criminal activity.³⁸ Congress gave this certification power to law enforcement, prosecutors, and judges, as well as other agencies involved in investigating and prosecuting crime.³⁹ Law enforcement personnel certify only her cooperation, one element of her claim. They are not certifying any other aspect of her claim, such as whether she suffered harm, whether any prior criminal convictions defeat her claim, or whether her claim falls within the statutory cap of 10,000 visas per year. The statute says nothing about who within qualifying law enforcement agencies can sign certifications, provides no process to bypass the certification if law enforcement personnel refuse to give it, and does not provide a standard form or language to obtain a certification.

Only if Rose gets her certification can she submit the full U visa petition to USCIS.⁴⁰ In this petition, Rose must establish that she meets all of the statutory requirements, that she is not otherwise disqualified from lawful status, and that she falls within the statutory cap of 10,000 visas per year. USCIS's Vermont Service Center has a team of review officers trained to handle domestic violence crimes committed against immigrant victims.⁴¹ Since Rose obtained a certification, she then submitted to USCIS her mandatory forms and fees,⁴² the certification, and a required personal statement,⁴³ an affidavit that laid out her story with credible supporting evidence.⁴⁴

38. *Id.*

39. *Id.*

40. Memorandum from William Yates, Assoc. Dir. of Operations, U.S. Citizenship & Immigration Servs., Dep't of Homeland Sec., Centralization of Interim Relief for Nonimmigrant Status Applicants (October 8, 2003), <http://www.uscis.gov/files/pressrelease/UCNtrl100803.pdf> (authorizing USCIS to process U visa applications, despite USCIS having centralized the U visa interim process at the USCIS Vermont Service Center, which has led to more consistent results).

41. See U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., QUESTIONS AND ANSWERS: FILING T, U, AND VAWA PETITIONS WITH USCIS 3 (Aug. 3, 2009), http://www.uscis.gov/USCIS/Office%20of%20Communications/Community%20Relations/t_u_faq_final_for_website_8_24_09.pdf (describing in detail the kind of training U visa adjudicators at USCIS receive); see also Questions and Answers: USCIS Nat'l Stakeholder Meeting, Office of Commc'ns, U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec. (Mar. 31, 2009), http://www.uscis.gov/files/nativedocuments/march09_qa_20april09.pdf (responding to the TVPRA's request for a report on the effectiveness of the VAWA unit at the Vermont Service Center and training received by VAWA unit staff).

42. U.S. CITIZENSHIP AND IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., G-1055, FEE SCHEDULE, <http://www.uscis.gov/files/nativedocuments/G-1055.pdf> (listing the fees governing biometrics and Form I-192). Fee waivers may be available pursuant to 8 C.F.R. § 103.7(c)(5) (2009) for U visa petitioners.

43. See generally Instructions for Form I-918, *supra* note 5.

44. 8 C.F.R. § 214.14(2)(iii) (2009) ("The statement may include information supporting any of the eligibility requirements"); Instructions for Form I-918, *supra* note 5 ("You *must* provide a personal narrative statement. This statement should describe the qualifying criminal activity of

Rose's ability to present the full merits of her case to USCIS for adjudication was critical. In Rose's case, her affidavit was in her own words and in her native Spanish language. It told about her struggles in El Salvador; all of Jorge's abusive conduct leading up to the arrest; her fears about testifying against Jorge, including the stalking and threats by José; and her disappointment and sense of loss over José's subsequent separation from her and then violent sexual assault on her. It also positioned her as a hard worker, working to provide for her son and support her family in El Salvador. It also told her story as a woman of tremendous faith and moral strength of character. The full adjudication of her claim before USCIS thus positioned her petition in context. Rose and her advocates could position the extent of her cooperation balanced against the threats that José and his brother were making against her. She demonstrated that she suffered harm, for example, through medical records documenting the risk of miscarriage coupled with her own emotionally compelling narrative articulating her fears.

Since Rose held a U visa for three years on an interim basis, she may subsequently be eligible to apply for permanent residency under the statute,⁴⁵ however, the statute provided little guidance on what she might need to prove to qualify for this adjustment of status. The statute briefly articulates that under the discretion of the Secretary of Homeland Security the petitioner's status may be adjusted to that of an immigrant if she applies for adjustment and is eligible.⁴⁶

B. *The Regulatory Evolution of the Law Enforcement Certification*

The most distinguishing characteristic of the U visa legislation is the threshold role of the certification. This section traces the regulatory evolution of the certification requirement. For a seven year period, law enforcement personnel issued certifications following USCIS's informal guidance and departmentally generated internal procedures to varying degrees of success.

which you were a victim and must include the following information: 1) The nature of the criminal activity; 2) when the criminal activity occurred; 3) who was responsible; 4) the event surrounding the criminal activity; 5) how the criminal activity came to be investigated or prosecuted; and 6) what substantial physical and/or mental abuse you suffered as a result of having been the victim of the criminal activity.") (emphasis added).

45. 8 U.S.C. § 1255(m)(1) (2006) (giving the Secretary of Homeland Security the power to adjust the status of aliens provided with nonimmigrant status under § 1101(a)(15)(U) to aliens lawfully admitted for permanent residence).

46. *Id.* (outlining that adjustment may be granted if U visa nonimmigrants have been in the United States for at least three years since their admission as a U visa nonimmigrant and if their continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest, unless the Secretary determines based on affirmative evidence that the alien unreasonably refused to provide assistance in a criminal investigation or prosecution).

The interim regulations, promulgated in 2007, formalized rigid and centralized certification procedures, imposed an “ongoing cooperation” requirement on victims, and ratcheted the certification process up to the agency head level.

1. LEC “Interim Relief” Protocols

It took USCIS seven years⁴⁷ and a class action lawsuit⁴⁸ to promulgate the necessary regulations to effectuate the certification requirements and the U visa legislation. It took USCIS nine years before it promulgated the regulations for permanent adjustment of status.⁴⁹ Advocates and law enforcement personnel thus had to create informal mechanisms and certification protocols to proceed over the seven years awaiting U visa regulations. These interim procedures were largely ad hoc (and inconsistent from jurisdiction to jurisdiction), rendering the implementation complex and time-consuming for petitioners and their advocates,⁵⁰ but positioning at least

47. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,014–15 (Sept. 17, 2007).

48. *See, e.g.,* Catholic Charities CYO v. Chertoff, No. C 07-1307 PJH, 2007 WL 2344995, at *2 (N.D. Cal. Aug. 16, 2007) (outlining class action complaint filed by Catholic Charities and other organizations providing legal aid to indigent immigrants against then-Secretary of the Department of Homeland Security Michael Chertoff and USCIS, alleging that defendants’ failure to implement the U visa program was unlawful and had made plaintiff organizations’ “work and achievement of their goals more difficult and costly”); Complaint at 6–7, 25, Catholic Charities CYO v. Chertoff, No. C 07-1307 PJH, 2007 WL 2344995 (N.D. Cal. Aug. 16, 2007), *available at* <http://vocesunidas.org/downloads/3-6-07UVisaComplaint-Updated.pdf> (alleging that defendants’ failure to implement U visa regulations interferes with plaintiff organizations’ “work and makes the achievement of its goals substantially more difficult. . . . [Plaintiff organizations’] delivery of services to crime victims eligible for U visas is more difficult, time-consuming, and expensive than is its delivery of like services to persons who seek lawful status under provisions of the Immigration and Nationality Act for which implementing regulations have been duly promulgated. . . .” “Defendants have . . . persisted in their failure to afford crime victims a means to apply for and obtain U visas. Instead, defendants have granted some U visa-eligible persons a quasi-legal, non-statutory temporary status known as ‘deferred action.’ Deferred action is no more than an exercise of prosecutorial discretion not to seek a crime victim’s immediate deportation or removal.”).

49. § 245.24(b).

50. *See* Letter from Rena Cutlip-Mason, Dir. of Legal Servs. et al., Tahirih Justice Ctr., to the Regulatory Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep’t of Homeland Sec., Comments of the Tahirih Justice Ctr. on the Interim Rule on Eligibility for “U” Nonimmigrant Status, DHS Docket No. USCIS 2006-0069 (Nov. 16, 2007), *available at* <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=090000648036531c> (“The pervasive lack of understanding and inconsistent implementation (of U visa certification) is something with which Tahirih is unfortunately all too familiar.”). The comment goes on to explain how a particular police department hostile to immigrants refused to sign U visa certifications, noting “the biggest problem in both cases was the lack of understanding of the U Visa, not the lack of single certifying official.” *Id.*; *see also* Letter from Lynn Neugebauer, Dir., Safe Horizon Immigration Law Project, to Chief, Regulatory Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep’t of

some jurisdictions in a strong and successful partnership with the advocate and immigrant community. Rose and countless petitioners like her thus had to maneuver through the uncertainty of this interim relief period.

This interim relief period was largely unburdened by law enforcement hierarchy and bureaucracy.⁵¹ Law enforcement officials with actual knowledge of the investigation were eligible to provide certification, regardless of title or status.⁵² During this lengthy interim relief period, petitioners were generally able to obtain certifications directly from individual officers with specific knowledge of their cases. Knowledgeable personnel included both trained domestic violence advocates within the law enforcement community and officers with knowledge of the relevant criminal activity and the individuals involved.⁵³ The involvement of knowledgeable personnel

Homeland Sec., DHS Docket No. USCIS 2006-0067 (Feb. 10, 2009), *available at* <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=090000648084f734> (noting that procedures concerning when certifications would be filed by a law enforcement office differed across jurisdictions); Letter from Mary Meg McCarthy, Executive Dir., Nat'l Immigrant Justice Ctr., to Chief, Regulatory Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Feb. 10, 2009), *available at* <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480365376> (noting that certain jurisdictions in Illinois refuse to sign certification forms and that certain jurisdictions go so far as to force U visa applicants to file FOIA requests for basic information about cases in which they were the victim).

51. *See, e.g.*, Letter from Sally Kinoshita et al., Nat'l Network to End Violence Against Immigrant Women, to Dir., Regulatory Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 15, 2007), *available at* <http://www.regulations.gov/search/Regs/contentStreamer?objectId=090000648036558e&disposition=attachment&contentType=msw8> ("Many law enforcement agencies have multiple officers including non-supervisory officers signing certifications, based on their expertise and connection to victims." Such officers often are involved in community policing and are bilingual and bicultural. Yet they "may be less likely to have worked their way up into supervisory positions."); Letter from the Am. Immigration Lawyers Ass'n to Dep't of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 16, 2007), *available at* <http://www.regulations.gov/search/Regs/contentStreamer?objectId=09000064803656b3&disposition=attachment&contentType=pdf> (noting that the designation of law enforcement heads as certifiers will add a layer of bureaucracy to the law enforcement certification that did not exist before).

52. *See, e.g.*, Letter from the Am. Immigration Law. Ass'n to Dep't of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 16, 2007), *available at* <http://www.regulations.gov/search/Regs/contentStreamer?objectId=09000064803656b3&disposition=attachment&contentType=pdf> (noting that newly proposed regulations mark a shift in policy "from authorizing officials with actual knowledge to authorizing an official, who is sure to be removed from the case").

53. *See, e.g.*, Letter from Sally Kinoshita et al., Nat'l Network to End Violence Against Immigrant Women, to Dir., Regulatory Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 15, 2007), *available at* <http://www.regulations.gov/search/Regs/contentStreamer?objectId=090000648036558e&disposition=attachment&contentType=msw8> ("Law enforcement personnel who are familiar with immigration issues, domestic violence dynamics, culturally appropriate responses, and language access often develop real working relationships with advocates for immigrant women Many

generally carried with it benefits for victims of domestic violence.⁵⁴ Immigrant victims of domestic violence who come forward to assist law enforcement in the investigation of crimes face greater obstacles than other crime victims;⁵⁵ they also face the challenges associated with leaving abusers⁵⁶ and with the division of their families.⁵⁷ Law enforcement officers who

of the officers involved are bilingual and bicultural officers. . . . These officers often have the trust of immigrant battered women—who are often otherwise hesitant to call the police. . . .”).

54. See, e.g., Letter from the Am. Immigration Law. Ass’n to Dep’t of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 16, 2007), available at <http://www.regulations.gov/search/Regs/contentStreamer?objectId=09000064803656b3&disposition=attachment&contentType=pdf> (noting that an investigating or prosecuting official is more accessible to a U visa applicant and that “[i]t is often necessary to repeatedly follow up with a law enforcement officer or prosecutor” and that “[i]f the certifying official is one person, handling many requests in addition to other responsibilities, it is likely that some victims will be lost, and the stated purpose of the statute, ‘offering protection to victims’ will not be met.”).

55. Immigrant women face substantial barriers when attempting to access services to stop abuse. For instance, immigrant victims of domestic violence often face indifference and inaction from police officers based on the pervasive view that domestic violence is an accepted way of life in immigrant communities. Another challenge facing immigrant women is the language barrier. Many immigrant victims of domestic violence do not speak English. Many of the police officers responding to reports of domestic violence only speak English. Furthermore, a 2003 study revealed that the arrest rate for abusers was only 28%. In this way, police officers as gatekeepers of the judicial system are often the determinant factor in whether immigrant victims of domestic abuse will be able to access the judicial system. See generally Leslie E. Orloff et al., *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 43 (2003) [hereinafter Orloff et al.]; Leslye E. Orloff & Dave Nomi, POVERTY & RACE RES. ACTION COUNCIL, *Identifying Barriers: Survey of Immigrant Women and Domestic Violence in the DC Metropolitan Area*, 6 POVERTY & RACE 9 (1997); Catherine F. Klein & Leslye Orloff, *Providing Legal Protection for Battered Women: An Analysis of Statutes and Case Law*, 21 HOFSTRA L. REV. 801 (1993).

56. See Orloff et al., *supra* note 55, at 55 (explaining that many times the accused batterer will use the battered woman’s legal status or lack of documentation as a weapon of abuse); Ryan Lilienthal, Note, *Old Hurdles Hamper New Options for Battered Immigrant Women*, 62 BROOKLYN L. REV. 1595, 1604 (1996); Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO J. POVERTY L. & POL’Y 245, 293 (2000) (“[T]hreats of deportation are very powerful tools used by abusers of immigrant women to keep them in abusive relationships and prevent them from seeking help.”).

57. See Karyl Alice Davis, Comment, *Unlocking the Door by Giving Her the Key: A Comment on the Adequacy of the U-Visa Remedy*, 56 ALA. L. REV. 557, 571 (2004) (battered women’s fear of deportation is exacerbated by the fear that she may lose custody of her children, return to poverty or political persecution in her homeland, no longer be able to aid her family in her home country, and face rejection from her friends and family members because she sought protection); see also LETI VOLPP, *WORKING WITH BATTERED IMMIGRANT WOMEN: A HANDBOOK TO MAKE SERVICES ACCESSIBLE* 17 (1995).

investigate domestic violence crimes may develop close bonds with the reporting victims and understand the specific complexities of their situations.⁵⁸

Many agencies had several certifying officials, often strategically selected because of their close relationships working with immigrant populations or domestic violence victims.⁵⁹ Thus, these certifying officials were often knowledgeable about both the petitioner's case and the immigrant domestic violence experience. For example, many of these officers were part of community policing programs or were new officers hired to serve the rapidly growing immigrant population.⁶⁰ Accordingly, these officers frequently lacked supervisory powers in these roles.⁶¹

Through these working relationships, certain law enforcement personnel became educated on the certification requirements and U visa relief. Domestic violence and immigrants' rights advocates became integral catalysts to U visa administrative implementation during this period as they created template certification forms with instructions for certifying officials that laid out the statutory requirements of eligibility.⁶² Advocate groups were able to exchange success strategies through a nationwide list serve of practitioners, compile and distribute contact information for certifying officials, and circulate uniform cover letters and certification forms. Advocates also played an instrumental role in educating law enforcement personnel generally.

The protocols that emerged during this interim relief period also included considerable drawbacks and uncertainty as well. Most notably, petitioners' success in obtaining certifications was largely dependent on the knowledge and sophistication of the relevant law enforcement personnel, agency, and jurisdiction. Some jurisdictions refused to issue certifications. Others distorted the legal standard. There was also no accountability.

This led to considerable uncertainty and may have contributed to the relatively low number of petitioners during the interim relief period. During this interim relief period, USCIS processed approximately 8,000 interim relief

58. See, e.g., Letter from Sally Kinoshita et al., Nat'l Network to End Violence Against Immigrant Women, to Dir., Reg. Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 15, 2007), available at <http://www.regulations.gov/search/Regs/contentStreamer?objectId=090000648036558e&disposition=attachment&contentType=msw8>.

59. *Id.*

60. *Id.*

61. *Id.*

62. Letter from Lynn Neugebauer, Dir., Immigration Law Project, Safe Horizon to Chief, Reg. Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., DHS Docket No. USCIS 2006-0067 (Nov. 16, 2007), <http://www.regulations.gov/search/Regs/contentStreamer?objectId=09000064803654a4&disposition=attachment&contentType=msw8>.

applications⁶³ and granted interim status to approximately 5,800 petitioners that presented a *prima facie* case.⁶⁴

Much of this interim relief framework worked to Rose's advantage. In Rose's case, the officer who signed her certification during this interim period first met her at the scene of the crime. He heard her testimony directly. He saw her fear and anguish over the possible harm to her baby, perhaps even her fear of deportation. He observed her firsthand interactions with José and Jorge. He also testified in the trial. Knowing about Rose, her case, and her community, he was well positioned to understand the complexity of her experience. Equipped with this personal knowledge, yet knowing very little about the U visa and the certification process, the officer signed the certification in Rose's case. The advocates equipped the officer (and his supervisors) with informative memoranda prepared by and used widely in the advocate community to explain the U visa process and to answer any questions preemptively. The flexibility of this process, in Rose's case, allowed the *pro bono* lawyers representing her to negotiate successfully with the officers involved. The process was largely devoid of hierarchy and politics. The officer did seek his supervisor's approval, but the supervisor signed promptly and without objection. Rose was "fortunate" to have been a victim of crime in Fairfax, Virginia, however.

The uncertainties surrounding the U visa process absent regulatory guidance led to a lawsuit challenging USCIS's inaction.⁶⁵ Advocacy organizations representing immigrants eligible for U visas filed a class action against the Secretary of the Department of Homeland Security and Citizenship and Immigration Services.⁶⁶ The plaintiffs alleged that the agency had violated their constitutional due process and equal protection rights, and were in statutory violation of the enabling legislation and the Administrative Procedure Act ("APA") by failing to implement the U visa program in a timely manner, failing to issue U visas to eligible petitioners, and failing to implement appropriate program standards and documentation.⁶⁷ The court required the government to submit a monthly report regarding the status of the

63. Viji Sundaram, *U Visa Gives Immigrant Women Victims a New Chance*, NEW AM. MEDIA, Sept. 21, 2007, http://news.newamericamedia.org/news/view_article.html?article_id=345ac44e65dd9d7761188595c37c7046.

64. OFF. OF COMM'NS, U.S. CITIZENSHIP AND IMMIGRATION SERVS., FACT SHEET (Sept. 5, 2007), http://www.uscis.gov/files/pressrelease/U-VisaFS_05Sep07.pdf.

65. Catholic Charities CYO v. Chertoff, No. C 07-1307 PJH, 2007 WL 2344995, at *1-*3 (N.D. Cal. Aug. 16, 2007).

66. *Id.* at *1.

67. *Id.* at *2-*3.

regulations.⁶⁸ Given the uncertainty that permeated this interim relief period, advocates eagerly awaited USCIS's promulgation of the regulations.⁶⁹

2. U Visa Regulations

In September 2007, USCIS published the U visa interim final rule, imposing new certification procedures, which necessarily altered the "interim relief period" protocols.⁷⁰ USCIS promulgated these interim regulations pursuant to a provision of the APA excepting the need for public comment before a rule takes effect where public comment would be "impracticable and contrary to the public interest."⁷¹ This interim regulation framework meant that advocates began working immediately with the interim regulations, unable to benefit from the commenting process.⁷²

The interim final rule established procedures for petitioners seeking U visas and provided petitioners who assisted government officials in the investigation and prosecution of criminal activity with temporary immigration benefits.⁷³ U visa petitioners were required to submit Form I-918.⁷⁴ It also required petitioners who had received the U visa interim relief to submit the high fees accompanying the Form I-192 inadmissibility waiver.⁷⁵

Perhaps the most significant regulatory change to the certification requirement is the "agency head" requirement, which was not in the BIWPA.⁷⁶ The interim final rule expressly required the certifying official be either the head of the qualifying agency or a supervisor designated by the head.⁷⁷ USCIS

68. *Id.* at *8.

69. *Id.* at *2, *8–*9 (arguing that the unavailability of U visas require [organizations] to assist "clients to apply for two benefits instead of one").

70. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,015 (Sept. 17, 2007).

71. *Id.* at 53,032 (explaining that the Administrative Procedure Act (APA) allows for an exception to the requirements for soliciting public comment before a rule takes effect when the agency finds a compelling public need for rapid implementation of the rule; the USCIS found that delaying the implementation in order to take public comment would be "impracticable and contrary to the public interest" and therefore the promulgation of the rule without public comment was justified).

72. *Id.*

73. *See id.* at 53,015; Press Release, Off. of Commc'ns, U.S. Citizenship and Immigration Servs., USCIS Publishes New Rule For Nonimmigrant Victims Of Criminal Activity (Sept. 5, 2007), http://www.uscis.gov/files/pressrelease/U-visa_05Sept07.pdf.

74. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., DEP'T OF HOMELAND SEC., FORM I-918, PETITION FOR U NONIMMIGRANT STATUS (Aug. 31, 2007), <http://www.uscis.gov/files/form/I-918.pdf>.

75. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. at 53,014.

76. 8 U.S.C. § 1184(p)(1) (2006).

77. 8 C.F.R. § 214(a)(3) (2009).

explained that this additional requirement was “to ensure the reliability of certifications.”⁷⁸

Another significant change that USCIS imposed in the interim regulations was an expansion of the extent of the victim’s cooperation. In applying for permanent resident status, the petitioner must not have refused or failed to cooperate in providing “information and assistance reasonably requested.”⁷⁹ USCIS interpreted the statute to require an “ongoing responsibility on the alien victim to provide assistance, assuming there is an ongoing need for the applicant’s assistance.”⁸⁰ USCIS based this interpretation on Congress’s intent that individuals be eligible for the U visa at early stages of investigations.⁸¹ USCIS explained that without the additional requirement to provide ongoing assistance, an individual would otherwise be eligible “if the alien only reports the crime” without providing additional assistance, which would not further the purpose of BIWPA.⁸² USCIS specifically stated that the rule did not require actual prosecution, thus reaffirming the range of cooperation available.⁸³

USCIS also standardized the certification. The interim final rule required the petitioner to include a Form I-918, Supplement B for agency certification in her application.⁸⁴ Certifying law enforcement officials must demonstrate their qualifications to complete the form, select the category of criminal activity involved, describe the relevant criminal investigation, describe any injuries to the victim, identify and describe the type of help that the victim is providing, and explain the involvement of any of the victim’s family members.⁸⁵ While the I-918B is required, the petitioner may also submit other evidence of helpfulness, such as “trial transcripts; court documents; police reports; news articles; copies of reimbursement forms for travel to and from court, affidavits of other witnesses or officials.”⁸⁶ USCIS also explained that the LEC would receive “significant weight” in the U visa determination.⁸⁷

78. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,023.

79. 8 C.F.R. § 214.14(b)(3) (exempting certain categories of minors and petitioners who are legally incompetent).

80. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,019 (concluding that this interpretation is consistent with the plain language of the statute).

81. *Id.*

82. *Id.*

83. *Id.* at 53,020.

84. U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., INSTRUCTIONS FOR I-918, SUPPLEMENT B, U NONIMMIGRANT STATUS CERTIFICATION (Aug. 31, 2007), <http://www.uscis.gov/files/form/I-918.pdf> [hereinafter SUPPLEMENT B].

85. *Id.*

86. U.S. CITIZENSHIP AND IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., PETITION FOR APPLICATION FOR T NONIMMIGRANT STATUS (Oct. 24, 2005), <http://www.us>

Adding to the level of uncertainty inherent in the U visa framework and complicating lawyering strategy was the absence of regulations regarding the eligibility requirements for U petitioners to apply for a lawful permanent resident status adjustment.⁸⁸ While advocates explained to clients that the U visa may offer a route to permanent residency, absent regulations it was hard for clients and advocates to adequately assess the likelihood of success.

3. The LEC Resurfaces in the U Adjustment Regulations

USCIS issued regulations for U adjustment—the process by which U visa holders can seek permanent status under certain conditions—on December 12, 2008, effective January 12, 2009.⁸⁹ These regulations allow for adjustment if the U visa holder applies, has lawful U nonimmigrant status, continues to hold U nonimmigrant status, has been continuously present for three years since the U nonimmigrant admission date, is not inadmissible under other immigration provisions, “has not unreasonably refused to provide assistance to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the applicant was granted U nonimmigrant status, as determined by the Attorney General, based on affirmative evidence,” and the petitioner’s presence is justified on humanitarian grounds, to ensure family unity, or in the public interest.⁹⁰

In determining whether a petitioner has not unreasonably refused to assist in the investigation or prosecution of the offense, USCIS instructs the Attorney General to make that decision based on all of the evidence taken as a whole.⁹¹ Factors the Attorney General should consider include general law enforcement, prosecutorial, and judicial practices; the assistance asked of other victims of crimes; the nature of the requested assistance; the nature of the victimization; the victim and witness assistance guidelines; the specific circumstances of the victim; and the “age and maturity of the applicant.”⁹² Petitioners may demonstrate reasonable cooperation by either submitting a signed newly executed certification⁹³ or an affidavit describing that the petitioner either

cis.gov/err/D1%20-%20Revocation%20of%20Nonimmigrant%20Visa%20Petition%20Approval/Decisions_Issued_in_2005/OCT242005_02D1101.pdf.

87. SUPPLEMENT B, *supra* note 84.

88. *See supra* notes 48–49.

89. Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75,540, 75,540–64 (Dec. 12, 2008).

90. 8 C.F.R. § 245.24(b) (2009).

91. *Id.*

92. § 245.24(a)(5).

93. § 245.24(e)(1)–(2).

meets the requirements⁹⁴ or that law enforcement's requests were unreasonable.⁹⁵

This framework thus necessitates two additional junctures for advocacy, positioning the petitioner to again reach out to law enforcement to certify ongoing cooperation and then reapply to USCIS. The subsequent interim final rule on both the U visa and the adjustment, coupled with the changing political dynamic for immigrant victims of domestic violence, collectively shift the balance of power to law enforcement personnel, distorting the dual purposes of the statute and thwarting its effectiveness, as discussed in Section III.

III. DUAL PURPOSES THWARTED

The regulatory changes to the certification requirement undercut Congress's dual purpose framework by ratcheting up the certification process to the agency head level and imposing an ongoing cooperation requirement. These regulations position the certification process in a more senior, more bureaucratic, and more formal posture, which offers some benefits and some drawbacks for petitioners. The drawbacks include the risk of politicizing the certification process, a threat that has magnified considerably in the broader legal, social, and political context that has evolved for undocumented immigrants between statutory enactment and regulatory promulgation. Law enforcement agencies over the past nine years have played an increasingly active role enforcing federal immigration laws at the local level. The increased regulatory power given to law enforcement personnel in the regulations, combined with the heightened power of local law enforcement, fatally alter the symbiotic balance that Congress envisioned – a balance that was already teetering after the interim regulations took effect. While the U visa framework was supposed to empower victims to come forward to law enforcement and ensure that the justice system had the necessary tools to enforce crimes committed against all, including undocumented immigrants, the resulting framework thwarts both statutory purposes and undermines the efficacy of the framework entirely. This section unpacks these complexities.

A. *Elevating Certification Power to the Agency Head Level Undercuts the Dual Purpose Framework*

The interim regulations centralize and elevate the authority to issue certifications to the agency head level.⁹⁶ Because the certification is a necessary component to getting a U visa, it functions as a complete gatekeeper

94. § 245.24(e)(2).

95. § 245.24(e)(2)(ii).

96. 8 C.F.R. § 214.14(a)(3)(i) (2009).

to relief.⁹⁷ The agency head regulatory requirement is more rigid than the statute.⁹⁸ The statute requires a “certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority with investigating criminal authority.”⁹⁹ Yet the regulations limited the certifying official signatories to those in “a supervisory role who ha[ve] been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency.”¹⁰⁰ USCIS explained that “this definition is reasonable and necessary to ensure the reliability of certifications” and anticipated that it “should encourage certifying agencies to develop internal policies and procedures so that certifications are properly vetted.”¹⁰¹

Following USCIS’s release of the interim regulations, stakeholders expressed their discontentment with the agency head requirement in the formal comments process. They protested that it was unnecessarily bureaucratic, exceeded the scope of the statute, and undermined the purpose of the law.¹⁰² They argued that Congress intended for each law enforcement agency to implement the certification process within its existing protocols and that USCIS was outside the scope of its authority to centralize and formalize this process.¹⁰³ They requested that USCIS revise the agency head requirement to a more user-friendly “check the box” approach in which the signatory validates his or her certification authority,¹⁰⁴ or a hands-off approach entirely authorizing law enforcement personnel to implement effective authorization procedures, or imposing an “actual knowledge” threshold to position

97. 8 U.S.C. § 1184(p)(1) (2006).

98. The Form I-918B on its face is a bit more nuanced in that it allows advocates to submit evidence of the certifying official’s authority from the agency head, perhaps expanding the stricter regulatory guidelines.

99. § 1184(p)(1) (2006).

100. § 214.14(a)(3)(i).

101. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,023 (Sept. 17, 2007).

102. *E.g.*, Letter from Dan Kesselbrenner, Dir., Nat’l Immigration Project of the Nat’l Law. Guild, to Dir., Reg. Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep’t of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 15, 2007), *available at* <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480364dbf>. *See generally* Jamie R. Abrams, *Legal Protections for an Invisible Population: An Eligibility and Impact Analysis of U Visa Protections for Immigrant Victims of Domestic Violence*, 4 MOD. AM. 26 (2008) (describing comprehensively the comments filed in response to the Interim Regulation).

103. *See generally* Abrams, *supra* note 102.

104. *See, e.g.*, Letter from Lori J. Elmer, Staff Attorney, Legal Aid of N.C., Inc., to Dir., Reg. Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep’t of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 15, 2007), *available at* <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480365235>.

knowledgeable law enforcement personnel to issue certifications.¹⁰⁵ Of course, in the administrative context of “interim regulations,”¹⁰⁶ USCIS received these comments in November 2007, but has not acted on them yet in promulgating a final rule.¹⁰⁷

The implications of the interim regulations on the certification process were thus immediate and problematic. This agency head framework, as anticipated by comment submitters, has proven precarious, if not disastrous. Many agencies in the interim relief period relied on individuals with special expertise to manage the certification process, such as domestic violence or bilingual officers. These individuals may not be in supervisory roles as required under the regulations. The agency head requirement jeopardizes the sensitivity and institutional knowledge that these trained units brought to the certification process, particularly in their understanding of “cooperation” in the context of undocumented immigrant victims.¹⁰⁸

This agency head framework virtually necessitates the involvement of skilled legal advocates liaising with law enforcement at a high level. Successful petitioning requires access to the highest levels of law enforcement — access that is likely not available to immigrants due to their undocumented status, language barriers, and the power structures that impede immigrant interactions with law enforcement. Indeed practice guidance and commentary reinforce the interpersonal finesse necessary to secure a certification from an “agency head,” advising that the “key to obtaining certifications is developing a good working relationship with your local law enforcement offices.”¹⁰⁹ This

105. See, e.g., Letter from Ralston H. Deffenbaugh, Jr., President, Lutheran Immigration and Refugee Servs., to Richard Sloan, Chief, Reg. Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep’t of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 15, 2007), *available at* <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480364d83>.

106. See New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,032.

107. *Id.*

108. Gail Pendleton, *Winning U Visas: Getting the Law Enforcement Certification*, LEXISNEXIS EXPERT COMMENT., Feb. 2008, at 9 (“Domestic violence and sexual assault advocates have experience negotiating victim access and helpfulness to law enforcement. They are better positioned to explain why victims, especially your client, may be unwilling to do exactly what law enforcement wants.”).

109. *Id.* at 9–10 (“The traditional lawyering model does not work well with immigrant crime victim cases. Knowing the law is the easy part; having good social skills and taking the time and patience to use them is what will make the difference, and is what many lawyers find challenging about this work.”).

Law enforcement people are much more likely to respond favorably to a request from an advocate they know than to a request from an unknown attorney. Think about what their experience with attorneys is likely to have been and apply basic social psychology to your dealings with them. Whom do they already trust? What can you offer them that would help them (your client, explanations of immigration, law, etc.)? Try to understand their priorities (prosecuting perpetrators and keeping communities safe, not just helping

is problematic because it may not always be possible to develop a good relationship with the certifying authorities directly, particularly in rural areas where central agency heads may be geographically distant from the location of the victim.¹¹⁰

The regulations also state that USCIS will give “substantial weight” to the certification.¹¹¹ Form I-918B is the form that advocates must present for signature to law enforcement personnel. It explains that the certification itself does not confer status to the petitioner, a concern frequently expressed by law enforcement personnel.¹¹² Yet considerable confusion still exists at the law enforcement level.

USCIS ratcheting the certification process up the hierarchy of law enforcement and away from personnel with direct experience working with immigrant victims of domestic violence positions law enforcement personnel to distort their role to the detriment of petitioners. These distortions are indeed occurring. Law enforcement officers in many jurisdictions have conflated the power to issue *certifications* in support of a U visa petition with the power to issue the *U visa* directly. In a factually and politically unique application of the U visa framework following the terrorist attacks of 9/11, for example, prosecutors in New York refused to sign the certification based on their own determinations about whether the victim had suffered “substantial physical or mental abuse,” a question statutorily retained by USCIS decision-makers.¹¹³ This is just one very public example of the distorted role of law enforcement issuing LECs, but many others are occurring nationwide. For example, law enforcement personnel have refused to issue certifications or balked before signing where they did not see evidence of substantial harm to the petitioner, where they determined that the petitioner was not a “continuing victim,” where they decided that the circumstances did not merit one of the 10,000 visas available each year,¹¹⁴ where they decided that the particular claim was not meritorious, where they concluded that the crime was past the statute of

your client). Realize that they see the worst sides of our society and the violence humans commit on each other every day. If they appear cynical, jaded, or suspicious, it’s based on experience that those of us not in law enforcement rarely encounter.

Gail Pendleton, *Winning U Visas After the Regulations*, LEXISNEXIS EMERGING ISSUES ANALYSIS, Jan. 2008, at 10.

110. Pendleton, *supra* note 108, at 5.

111. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,024 (supplementary information).

112. SUPPLEMENT B, *supra* note 84, at 3; *see also* Pendleton, *supra* note 108, at 3 (reiterating that USCIS has the power to grant the U visa by considering the “totality of the circumstances”).

113. Nina Bernstein, *A Visa Case With a Twist: 9/11; Illegal Immigrants Testified to Try to Stay in U.S.*, N.Y. TIMES, Sept. 16, 2004, at B1 (describing how prosecutors distorted their role to determine the “whole question”).

114. 8 U.S.C. § 1184(p)(2)(A) (2006) (stating that no more than 10,000 U nonimmigrant petitions may be awarded in a fiscal year).

limitations, where they concluded there was no ongoing investigation, or where they concluded that the assailants could not be identified—all improper considerations in the certification determination.¹¹⁵

B. “Ongoing Cooperation” Requirement Reinforces the Power of Law Enforcement over Petitioners

Even if a petitioner obtains a certification and then the U visa, whether she gets permanent residency remains an open question. The regulations add an “ongoing responsibility” requirement, dictating that the victim must be helpful on an ongoing basis.¹¹⁶ Before she can apply for the permanent resident status adjustment she must not have refused or failed to cooperate in providing “information and assistance reasonably requested.”¹¹⁷ This positions law enforcement personnel with considerable power over U visa holders without requiring law enforcement to consider the reasonableness of a victim’s cooperation in context. U visa expert, Gail Pendleton, explains how this is happening in practice:

[T]his extra requirement appears to give a green light to law enforcers to use the certification as a weapon to coerce victims into doing things they do not feel comfortable doing. Real situations in which this has occurred include actions that may jeopardize victim safety or sanity, such as wearing a wire, testifying against a dangerous perpetrator, or subjecting herself to a rape trial in which her personal history and reputation will be ruthlessly examined and criticized.

The form also imposes an affirmative requirement on law enforcement to contact CIS if the applicant unreasonably refuses to cooperate.¹¹⁸

These issues are particularly problematic given the exclusive role of law enforcement agency heads issuing certifications, absent any standard of review, or right to appeal. “[O]ne bad experience with a lawyer can permanently sour a potential law enforcement ally’s willingness to help any immigrant crime victim.”¹¹⁹

Congressional findings support this. The statute stated that “[a]ll women and children who are victims of these crimes committed against them in the

115. See *supra* Section II.B.ii (explaining the limited determinations for law enforcement to make in the LEC process). These anecdotes are compiled through personal experience litigating U visa claims, dialogue, interviews, and correspondence with practitioners nationwide specializing in U visa and violence against women claims. The author would willingly share notes from interviews and correspondences describing these circumstances upon request.

116. SUPPLEMENT B, *supra* note 84, at 3.

117. 8 C.F.R. § 214.14(b)(3) (2009) (the Interim Rule includes the special criteria and exceptions for minors and incompetents).

118. Pendleton, *supra* note 108, at 8.

119. *Id.* at 10.

United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.”¹²⁰ The existing framework highlighted in this section undermines Congressional intent.¹²¹

The permanent residency adjustment regulations came out in January 2009.¹²² These regulations require her to prove that she has not failed to unreasonably provide cooperation.¹²³ She can do this with another certification or other credible evidence.¹²⁴ She also has to prove that she has maintained a continuous presence in the U.S. for three years since she got the U visa.¹²⁵ Finding this evidence and proving this can be difficult as many U visa holders have moved around extensively to find affordable housing and employment; a problem faced by the thousands of women who have been in interim status for nearly a decade.

Congress intended that the BIWPA would help law enforcement investigate and prosecute qualifying crimes brought against immigrant populations.¹²⁶ As promulgated, the regulations undermine Congress’s original dual intent by shifting more power to law enforcement. As explored in Section III.c this additional power and formality is problematic where local law enforcement personnel are increasingly active in enforcing federal immigration crimes. The combination of the regulatory framework and the broader legal, social, and political context collectively alter fatally the dual purposes that Congress intended.

*C. Local Law Enforcement Involved in Federal Immigration Enforcement
Fatally Alters the Underlying Symbiotic Relationship Congress Intended*

Since Congress enacted the BIWPA, the federal government has renewed its focus on enforcing immigration offenses and local law enforcement has played an evolving and expanding role in those heightened enforcement efforts. This shift in legal and political approaches to local law enforcement

120. H.R. REP. NO. 106-939, at 72 (2000) (Conf. Rep.).

121. See, e.g., *Catholic Charities CYO, v. Chertoff*, No. C 07-1307 PJH, 2007 WL 2344995, at *2, *5 (N.D. Cal. Aug. 16, 2007) (arguing that despite an unambiguous legal duty to promulgate regulations implementing the U visa program as commanded in the VAWA Reauthorization Act, where Congress directed defendants to “promulgate regulations to implement” the U visa program no later than 180 days after the enactment of this Act (which was on January 5, 2006), defendants have nevertheless persisted in their failure to afford crime victims a means to apply for and obtain U visas).

122. 8 C.F.R. § 245.24 (2009).

123. § 245.24(b)(5).

124. § 245.24(e)(1)–(4).

125. § 245.24(b)(3).

126. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 1502(b), 114 Stat. 1464, 1518 (2000).

interacting with undocumented immigrants fundamentally transforms the underlying premises of Congress's intent to strengthen law enforcement and protect victims.

Local law enforcement became more active in immigration enforcement following the United States government's "war on terror" immediately following the attacks of September 11, 2001,¹²⁷ significantly altering the BIWPA framework, enacted a year earlier. Shortly after these attacks, in 2002, the federal government reversed its longstanding policy of state and local preemption of the enforcement of federal civil immigration laws and announced that state and local law enforcement have the "inherent authority" to enforce federal immigration law.¹²⁸ Incredibly, even though this opinion constituted a 180-degree reversal of years of long-standing immigration enforcement policy, the Department of Justice refused to release its opinion publicly until litigation forced the Department of Justice to release it, albeit in heavily redacted form.¹²⁹ This policy reversal was a watershed moment for undocumented immigrants interacting with local law enforcement, thus implicating the U visa framework and the dual purposes upon which it was enacted.

Authorization for local law enforcement to collaborate with federal immigration is not new nor is criticism of local law enforcement functioning in this capacity.¹³⁰ State and local police have always had authority to make certain arrests for the most serious of immigration offenses.¹³¹ Since the

127. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Law*, 6 U. PA. J. CONST. L. 1084, 1085 (2004).

128. See John Ashcroft, Att'y Gen. of the U.S., Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2002) (revealing that the Department of Justice Office of Legal Counsel had concluded that state and local police possess "inherent authority" to enforce immigration laws); Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Att'y Gen. John Ashcroft 13 (Apr. 2, 2002), <http://www.aclu.org/FilesPDFs/ACF27DA.pdf>; Harris, *infra* note 131, at 25.

129. The opinion itself was not released until a lawsuit forced the Department to do so; only after the U.S. Court of Appeals for the Second Circuit affirmed the district court's order and mandated the release of the opinion did the government finally do so, albeit in a heavily redacted version. *Nat'l Council of La Raza v. D.O.J.*, 411 F.3d 350, 352 (2d Cir. 2005).

130. Numerous scholars have argued that local regulation of immigration is an unconstitutional violation of federal preemptory powers. Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role of Enforcement*, 2007 U. CHI. LEGAL F. 27, 34 (2007); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1563 n.22-23, 1564 n.25, 1595 n.199 (2008) (reviewing literature, court decisions, and scholarship on this debate); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 1003 (2004).

131. See 8 U.S.C. § 1326(a) (2006) (illegal reentry after deportation); 8 U.S.C. § 1253(a)(1) (2006) (failure to depart after deportation order, but not for low level civil infractions like

passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”),¹³² Congress gave the Attorney General the authority to authorize state and local law enforcement to participate in immigration enforcement.¹³³ Local law enforcement must sign a memorandum of agreement (“MOA”) agreeing to undergo appropriate training to enforce certain aspects of federal immigration law under the direction and supervision of sworn Immigration and Customs Enforcement (“ICE”) officers.¹³⁴ This authorizing legislation initially positioned law enforcement to share data and liaise with federal immigration officers.¹³⁵ The authorization remained largely dormant, however, until 2002.

No jurisdiction prior to 2002 entered into MOAs pursuant to the IIRIRA. The Florida State Police became the first jurisdiction to enter into an MOA in 2002,¹³⁶ contracting to train thirty-five state and local officers.¹³⁷ The trend toward concurrent enforcement accelerated after September 11, 2001 and state involvement normalized somewhat.¹³⁸

The Immigration Naturalization Service also began to communicate immigration data to local law enforcement on an unprecedented level.¹³⁹ In 2002 and 2003, the Department of Justice began to put information on civil

violating immigration status); *see also* David Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 22 (2006).

132. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

133. 8 U.S.C. § 1357(g) (2006) (authorizing the Attorney General to deputize state and local police to enforce federal immigration laws).

134. 8 U.S.C. § 1357(g)(1)–(3) (2006). These MOUs were codified as Section 287(g) of the Immigration and Nationality Act and are known colloquially as “Section 287(g) MOUs.” *See* Fact Sheet, U.S. Immigration and Customs Enforcement, Section 287(g), Immigration and Nationality Act; Delegation of Immigration Authority (June 22, 2007), <http://www.ice.gov/pi/news/factsheets/070622factsheet287gprover.htm>.

135. 8 U.S.C. § 1105 (2006) (articulation of the parameters for such cooperative agreements).

136. Fact Sheet, U.S. Customs and Immigration Enforcement, Section 287(g) and Nationality Act 2 (Aug. 16, 2006), <http://www.ice.gov/doclib/pi/news/factsheets/060816dc287gfactsheet.pdf>; Olivas, *supra* note 130, at 51; *see also* Harris, *supra* note 131, at 23 n.93.

137. Olivas, *supra* note 130, at 51.

138. Stumpf, *supra* note 130, at 1594–95.

139. *See* Statement of James W. Ziglar, Comm’r, Immigration and Naturalization Servs., before the House Comm. on Gov’t Reform, Subcomm. on Criminal Justice, Drug Policy and Human Res., (Dec. 5, 2001) (testifying regarding plan to enter immigration “absconder” records into the NCIC); *see also* Statement of Regulatory Priorities, 67 Fed. Reg. 74,158, 74,159 (Dec. 9, 2002) (“In the AAI [Absconder Apprehension Initiative], the Service has begun reviewing the files of absconders to enter appropriate records into the . . . [NCIC] database”); Chris Adams, *INS to Put in Federal Criminal Databases the Names of People Ordered Deported*, WALL ST. J., Dec. 6, 2001, at A22 (reporting statement of Commissioner and agency spokesperson that INS will start data entry “immediately”). *See generally* NCIC, <http://www.fbi.gov/hq/cjisd/ncic.htm> (last visited April 20, 2010).

immigration violations into the Federal Bureau of Investigation's National Crime Information Center (NCIC) database.¹⁴⁰ By late 2003, the Department of Justice had added more than 300,000 names of noncitizens subject to civil deportation orders to the NCIC database.¹⁴¹ Most of these cases concerned noncitizens who failed to leave the country when their visas had expired.¹⁴² This NCIC database was then made available to state and local police for their use in arrests of persons encountered in routine police-civilian interactions, such as traffic stops,¹⁴³ dramatically altering the role of local law enforcement.¹⁴⁴ USCIS's Secure Communities Initiative also broadly reflects federal prioritization of the identification and removal of undocumented immigrants through aggressive coordination, committing \$1.4 billion to coordinated enforcement efforts relying heavily on information sharing strategies.¹⁴⁵

For U visa petitioners, this information sharing is problematic because it escalates the risks for undocumented petitioners seeking police protection.

140. See, e.g., Nina Bernstein, *Crime Database Misused for Civil Issues, Suit Says*, N.Y. TIMES, Dec. 17, 2003, at A34 (detailing use of NCIC by U.S. Department of Justice for civil immigration violations); Hector Gutierrez, *Agents Seek Alien Fugitives*, ROCKY MTN. NEWS, Feb. 18, 2002, at 11A ("The Justice Department is entering the names of absconders into the [NCIC], the database for criminal records, so local law enforcement agencies can be aware of fugitives wanted by the INS and with whom they come in contact . . ."). The NCIC and its use are governed by federal statute 28 U.S.C. § 534 (2006).

141. See Statement of James W. Ziglar, Comm'r, Immigration and Naturalization Servs., before the House Comm. on Gov't Reform, Subcomm. on Criminal Justice, Drug Policy and Human Res., (Dec. 5, 2001) (testifying regarding plan to enter immigration "absconder" records into NCIC); Harris, *supra* note 134, at 27–28, n.108, n.110.

142. See, e.g., Bernstein, *supra* note 140.

143. Wishnie, *supra* note 127, at 1087.

144. Local police officers may be trained to determine whether criminal suspects in custody are undocumented immigrants. 8 U.S.C. § 1357(g) (2006). Local law enforcement officers can detain and begin deportation proceedings before turning cases over to the federal agency. *Id.* In 2002, Florida became the first state to enter into a formal agreement with the federal government under section 287 of the Immigration and Nationality Act to allow the state's enforcement of immigration laws. See Wishnie, *supra* note 127, at 1084. One tactic of Florida law enforcement agencies has been to undertake driver's license sting operations in hopes of arresting and detaining undocumented immigrants. *Id.* Altogether, this trend has allowed for local police to receive greater discretionary power in immigration cases. Access to the NCIC database has allowed state and local law enforcement to investigate, arrest, and detain individuals for violations of immigration laws. The trend seems to be that local police officers make these arrests during routine police-citizen encounters (e.g., traffic stops, routine checks for drunk drivers, etc.). *Id.*

145. See e.g., Fact Sheet, Dep't of Homeland Sec., Secure Communities (Aug. 13, 2009), http://www.ice.gov/pi/news/factsheets/secure_communities.htm (pledging to "improve[] public safety by implementing a comprehensive, integrated approach to identify and remove criminal aliens from the United States" through "planning, operational, technical, and fiscal activities devoted to transforming, modernizing, and optimizing the criminal alien enforcement process").

This is particularly problematic where there are widely known inaccuracies and problems with the data in the NCIC database.¹⁴⁶ Indeed certain jurisdictions have begun to run background checks on U visa applicants and taken it upon themselves to note prior arrests or convictions and to comment to USCIS that the officer does not support the visa application, even while certifying cooperation. This distorts the role of the law enforcement personnel in the certification process. While petitioners may be denied U visa status if there are certain prior criminal violations; this is not the role of law enforcement at the certification process.¹⁴⁷

Proposed federal legislation introduced in 2003 and again in 2005, while ultimately defeated, nonetheless demonstrates the transformed dynamic between undocumented immigrants and local law enforcement, suggesting underlying efficacy problems with the U visa framework. The Clear Law Enforcement for Criminal Alien Removal (“CLEAR”) Act of 2003¹⁴⁸ and its Senate counterpart, the Homeland Security Enhancement Act (“HSEA”),¹⁴⁹ sought to pressure local enforcement agencies to enforce federal immigration law. These resolutions proposed that jurisdictions that failed to enact a statute expressly authorizing local law enforcement “to enforce federal immigration laws in the course of carrying out the officer’s law enforcement duties shall not receive any of the funds that would otherwise be allocated to the State [under the INA].”¹⁵⁰ These bills and amendments ultimately failed, yet they sought to give state and local police officers the authority to enforce all federal immigration laws, give financial incentives to states and localities to comply, criminalize all immigration law violations, and place the names of those suspected to be in violation of immigration laws in the NCIC database.¹⁵¹ In

146. According to a study released by the Migration Policy Institute in December of 2005, between 2002–2004 immigration information found in the NCIC database was incorrect 42% of the time. See Harris, *supra* note 136, at 28, n.115; HANNAH GLADSTEIN ET AL., *BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002–2004*, at 12 (2005), http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf. The constitutionality of entering of data on civil immigration violations has been questioned. See Harris, *supra* note 136, at 29 (arguing that entering civil immigration violations into NCIC violates 8 U.S.C. § 1252(c); noting that most of the information that has been placed in NCIC is about Latinos sought on civil immigration charges).

147. 8 U.S.C. § 1101(a)(15)(U)(iii) (2006); 8 U.S.C. § 1191(a)(15)(U) (2006).

148. H.R. 2671, 108th Cong. § 1 (2003) (introduced by Rep. Charlie Norwood).

149. S. 1906, 108th Cong. § 1 (2003).

150. H.R. 2671, § 102(a). Additionally, the Act states that “[n]othing in this Act or any other provision of law shall be construed as making any immigration-related training a requirement for or prerequisite to any State or local law enforcement officer to enforce Federal immigration laws in the normal course of carrying out their law enforcement duties.” *Id.* § 109(d).

151. See generally Nat’l Council of La Raza, *State/Local Police Enforcement of Immigration Laws (CLEAR Act)*, <http://www.nclr.org/content/policy/detail/1063> (last visited April 20, 2010).

late 2005, the House passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 (although it did not pass the Senate), which would have pushed the CLEAR Act even further, making virtually all immigration offenses into felonies, criminalizing acts by people like social workers, nurses, doctors, and clergy that might help undocumented immigrants.¹⁵²

These proposals, even if unsuccessful, nonetheless undermine the ability of law enforcement to do their jobs.¹⁵³ Harris summarizes the resulting framework:

The proposed CLEAR Act, the DOJ's new "inherent authority" policy, and the Department's willingness to thrust untrustworthy immigration information into the NCIC system illegally sent a simple message to local police. The federal government, particularly the Department of Justice, wanted all law enforcement agencies arresting illegal immigrants, no matter how ill suited local police might feel for the task and regardless of how little officers might know about the intricacies of immigration issues . . . [T]he federal actions signaled unmistakably that the DOJ would no longer wait for agencies to volunteer under the MOU process.¹⁵⁴

The reactions of local law enforcement to these federal laws and proposals have been mixed. Certainly many jurisdictions have announced their willingness to collaborate with federal law enforcement under the IIRIRA. As of September 2008, the Department of Homeland Security had entered into 63 MOAs, and 80 MOAs authorizing local law enforcement to enforce immigration laws pursuant to Section 287(g) of the Immigration and Nationality Act were pending.¹⁵⁵ By October 2009, 73 agencies were actively participating in the 287(g) MOA Program, with an ongoing waiting list of additional participants.¹⁵⁶ Importantly to the U visa framework, these federal immigration partnerships have been largely initiated at the agency head level,

152. Harris, *supra* note 134, at 57.

153. See, e.g., Irasema Garza, *A Losing Proposition—How Immigration Enforcement Hurts Women and Communities*, HUFFINGTON POST, Oct. 6, 2009, http://www.huffingtonpost.com/irasema-garza/a-losing-proposition---h_b_309721.html.

154. Harris, *supra* note 134, at 30.

155. Catalogue of 287(g) Agreements/MOAs (as of September 2008), ACLU Immigrants' Rights Project, available at <http://www.aclu.org/immigrants-rights/about-aclus-immigrants-rights-project> (last visited April 20, 2010) (summarizing the scope of the agreements).

156. JESSICA M. VAUGHAN & JAMES R. EDWARDS, JR., CTR. FOR IMMIGRATION STUD., THE 287(G) PROGRAM: PROTECTING HOME TOWNS AND HOMELAND 1–3 (2009). Federal spending on the 287(g) program has increased from \$5 million in 2006 to \$54.1 million in 2009). *Id.* at 15. The Department of Homeland Security has trained more than 1000 officers under 287(g) local agreements. *Id.* at 1; see also Press Release, Dep't of Homeland Sec., Secretary Napolitano Announces New Agreement for State and Local Immigration Enforcement Partnerships & Adds 11 New Agreements (Jul. 10, 2009) (explaining that ICE standardized the 287(g) MOAs and that ICE had signed eleven more), http://www.dhs.gov/ynews/releases/pr_1247246453625.shtm.

by sheriffs and elected officials appealing to anti-immigrant political sentiment in their jurisdiction,¹⁵⁷ underscoring the tension in the agency head requirement of the certification.

Other jurisdictions have strongly resisted these federal trends and policy shifts.¹⁵⁸ Six prior participants in the 287(g) program have discontinued the program.¹⁵⁹ Other state and local jurisdictions have also voiced strong objections and reinforced the risks to the immigrant communities and thus to U visa petitioners. The national organization of police chiefs from the largest cities in America adopted a position statement strongly opposed to compelling local police involvement in immigration enforcement.¹⁶⁰ The statement expressed concern that local enforcement would “undermine the level of trust and cooperation between local police and immigrant communities.”¹⁶¹ This would “result in increased crime against immigrants and in the broader community.”¹⁶² Other agency heads or departments have made the following statements:

- “We’ve made tremendous inroads into a lot of our immigrant communities. To get into the enforcement of immigration laws would build wedges and walls that have taken a long time to break down.” Former Chief of the Sacramento Police Department, Arturo Venegas Jr.¹⁶³
- “I believe that taking on [immigration enforcement] would jeopardize those relationships and create unneeded tension in our community.” Chief Richard Miranda of the Tucson Police Department.¹⁶⁴

157. See, e.g., Randal C. Archibold, *Arizona County Uses New Law to Look for Illegal Immigrants*, N.Y. TIMES, May 10, 2006, at A19.

158. See Harris, *supra* note 136, at 43–44.

159. The ACLU reported that ICE announced that new 287(g) MOAs were signed with 67 state and local law enforcement agencies on October 16, 2009, and that six previous participants decided to drop the program. Press Release, American Civil Liberties Union, ICE Should End, Not Expand Agreements with Local and State Law Enforcement, Says ACLU (Oct. 16, 2009), <http://www.aclu.org/immigrants-rights/ice-should-end-not-expand-agreements-local-and-state-lawenforcement-says-aclu>.

160. MAJOR CITIES CHIEFS, M.C.C. IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES 9–10 (2006), http://www.majorcitieschiefs.org/pdfpublic/mcc_position_statement_revised_cef.pdf (last visited April 20, 2010).

161. *Id.* at 6.

162. *Id.*

163. Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. TIMES, Apr. 29, 2002, at A21.

164. Harris, *supra* note 136, at 41, n.151 (citing Tim Steller, *Expansion of Foreigner Arrest Plan Is Feared*, ARIZ. DAILY STAR, July 12, 2002, at A1).

- “We deal with immigrants from all over the world, many who are steeped in beliefs and practices that alienate them from law enforcement.” Newark, California, Police Department Chief Ray Samuels.¹⁶⁵
- “It’s very difficult in the immigration communities to get information from folks, and if there’s a fear of being reported . . . because of illegal status, then it just makes our job that much more difficult and it makes the city have that much more criminal activity.” Hans Marticiuc, President of the Houston Police Officers Union.¹⁶⁶
- “If police officers start [conducting immigration enforcement] . . . criminals will target undocumented people more.” Lt. Armando Mayoya of San Joaquin County Sheriff’s Office.¹⁶⁷
- Framingham, Massachusetts, Chief of Police Steven Carl explained, “It doesn’t benefit the Police Department to engage in deportation and immigration enforcement. We’re done [with 287(g)].”¹⁶⁸

Some jurisdictions have gone so far as to establish an affirmative sanctuary policy declaring that undocumented status will not be a sole basis for police action.¹⁶⁹ There are also parallel state initiatives both supporting and opposing immigration policies. Some localities have passed local resolutions and ordinances rejecting participation in immigration enforcement.¹⁷⁰ Other

165. *Id.* at 40 (citing Letter from Ray Samuels, Chief of Police, Newark, Cal. Police Dep’t, to Pete Stark, U.S. Representative (Sept. 17, 2003)).

166. *Id.* at 41.

167. *Id.*

168. Maria Sacchetti, *Agencies Halt Their Immigrant Scrutiny: Barnstable Sheriff, Framingham Police Say No*, BOSTON GLOBE, Oct. 2, 2009, at A1, available at http://www.boston.com/news/local/breaking_news/2009/10/framingham_barn.html.

169. See Harris, *supra* note 133, at 33–44. The Los Angeles Police Department, for example, has had a sanctuary policy in place since 1979. Office of the Chief of Police, L.A. Police Dep’t, Special Order No. 40 (Nov. 27, 1979) (preventing officers from arresting and processing anyone for illegal entry into the United States); see also Office of the Mayor of New York City, Exec. Order No. 41, § 2 (Sept. 17, 2003), http://www.nyc.gov/html/imm/downloads/pdf/exe_order_41.pdf; Office of the Mayor of Chicago, Exec. Order No. 85-1 (Mar. 7, 1985); CITY OF TAKOMA PARK, MD., ORDINANCE NO. 2007-58 (enacting “an ordinance reaffirming and strengthening the City of Takoma Park’s Immigration Sanctuary Law”).

170. See Durham, N.C. City Council Res. 9046 (Oct. 20, 2003); NAT’L IMMIGRATION LAW CTR., LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES (Dec. 2008), <http://www.nilc.org/immilawpolicy/LocalLaw/locallaw-limiting-tbl-2008-12-03.pdf>; San Francisco Admin. Code, § 12H.1, § 12H.2.1 (1989). See generally Stumpf, *supra* note 130 (discussing localities which have rejected participation in immigration enforcement, such as Durham, Chapel Hill, and Carrboro); THE PROGRESSIVE STATES NETWORK, THE ANTI-IMMIGRANT MOVEMENT THAT FAILED: POSITIVE INTEGRATION POLICIES BY STATE GOVERNMENTS STILL FAR OUTWEIGH PUNITIVE POLICIES AIMED AT NEW IMMIGRANTS (2008).

jurisdictions have sought anti-immigrant ordinances and called for more enforcement and regulation.¹⁷¹ The National Conference of State Legislatures (NCSL) tracks immigration legislation, and noted that from January to June, 2006, almost 500 immigration-related bills were introduced in state legislatures, and forty-four were enacted, in 19 states.¹⁷² Perhaps Congress's failed attempts to pass immigration reform in 2005 and 2006 may have actually sparked this state activity.¹⁷³

The increased power of local law enforcement reporting immigration violations results in a correlating increase in the fear and uncertainty that petitioners reporting crime face or perceive.¹⁷⁴ Undocumented immigrants keenly feel the legal and political shifts described above and these impacts are well documented.¹⁷⁵ As the Executive Director of the Center for Human

171. See e.g., Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 31 (2007). According to the National Conference of State Legislatures (NCSL), state laws related to immigration have increased dramatically in recent years. In 2005, 300 bills were introduced, 38 laws were enacted, and 6 vetoed. In 2006, activity doubled: 570 bills were introduced, 84 laws were enacted, and 6 vetoed. In 2007, activity tripled: 1,562 bills were introduced, 240 laws were enacted, and 12 vetoed. In 2008, 1305 bills were considered, 206 were enacted, 3 were vetoed. On July 17, 2009, NCSL reported that "[s]o far this year, more than 1400 bills have been considered in all 50 states. At least 144 laws and 115 resolutions have been enacted in 44 states, with bills sent to governors in two additional states. A total of 285 bills and resolutions have passed legislatures; 23 of these bills are pending Governor's approval and three bills were vetoed." NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION: JANUARY 1–JUNE 30, 2009 (July 17, 2009), <http://www.ncsl.org/documents/immig/ImmigrationReport2009.pdf>.

172. See Olivas, *supra* note 171, at 31; National Conference of State Legislatures, 2006 State Legislation Related to Immigration: Enacted, Vetoed, and Pending Gubernatorial Action, <http://www.ncsl.org/programs/immig/06ImmigEnactedLegis.htm>. Some troublesome jurisdictions include Georgia; Maricopa County, Arizona; New Hampshire; and Hazleton, Pennsylvania. Olivas, *supra* note 171, at 31–32. See generally Stumpf, *supra* note 130 (examining North Carolina's laws and resolutions seeking to regulate immigration through employment restrictions, limits on government benefits, and criminal law).

173. See Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441, 1444 (2009) (arguing that the surge in state and local immigration laws may have been precipitated by the belief that Congress was failing to act during its 2005–2006 sessions to enact meaningful immigration reform legislation).

174. Anna Gorman, *Crime Victims to Get U.S. Visas: Illegal Immigrants Who Cooperate in Certain Cases Have Been in Legal Limbo for Years*, L.A. TIMES, Sept. 6, 2007, at A19, available at 2007 WLNR 17371416.

175. See, e.g., Keeli Cheatham, *Program Helps Illegal Immigrants Get Citizenship While Police Fight Crime*, WSBT NEWS, June 25, 2008, <http://www.wsbt.com/news/local/21313324.html> (Indiana Legal Services attorney reports that individuals with immigration issues fear that they are "drawing unnecessary attention to themselves" and the local police reports that sometimes illegal immigrants will not answer the door for law enforcement); Mohar Ray, Student Article, "Can I See Your Papers?" Local Police Enforcement of Federal Immigration Law Post 9/11 and Asian American Permanent Foreignness, 11 WASH. & LEE RACE & ETHNIC ANCESTRY

Rights and Constitutional Law stated, “Immigrant crime victims are reluctant to come forward to cooperate in the investigation or prosecution of violent crimes because they fear deportation. . . . Those fears have multiplied recently with the increased cooperation between local law enforcement and Immigration and Customs Enforcement.”¹⁷⁶

These increased risks get at the heart of Congress’s dual purposes in enacting the BIWPA.¹⁷⁷ The whole point of the U visa structure was that immigrant victims are not the same as other victims; they face unique barriers and vulnerabilities.¹⁷⁸ Under the current regulatory, political, and legal framework, petitioners are less likely to come forward and law enforcement is positioned with unprecedented power.

IV. RESTORING THE BALANCE

Recognizing that the dual purposes around which Congress framed the U visa nonimmigrant classification have been thwarted by the regulatory certification framework, the ongoing cooperation requirement, the role of local law enforcement in federal immigration enforcement, and the heightened obstacles faced by undocumented immigrants, this section examines ways to restore the balance that Congress intended. Regulatory modifications in the final rule, statutory amendments to impose a certification bypass procedure, and increased law enforcement sensitization and training are viable alternatives within the existing paradigm, and these options are explored in sections A and B below. Section C notes the need for a new paradigm entirely to address the underlying objectives of protecting immigrants from domestic violence.

A. *Revising the Final Regulations*

Importantly, the agency head certification requirement and the ongoing cooperation requirements are both articulated in interim regulations, not final agency regulations.¹⁷⁹ Advocates vigorously responded to the interim regulations and explained why USCIS should revisit both of these

L.J. 197, 198 (2005) (describing how the Homeland Security Enhancement Act would likely place “undocumented Asian American immigrants in fear of contacting local authorities for assistance and/or emergency services, . . . “fearing that it would result in deportation); Christine Lehmann, *Bills Would Provide Safety Net for Battered, Immigrant Women*, 37 PSYCHIATRIC NEWS 8 (2002).

176. Gorman, *supra* note 174.

177. *See supra* notes 3–7.

178. *See supra* section II.A.

179. New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,015 (Sept. 17, 2007); *see also id.* at 53,032 (explaining the procedural context of the “interim final regulation” promulgation).

requirements.¹⁸⁰ USCIS is indeed in communication with immigration advocates and stakeholders regarding U visa implementation. For example, USCIS's ombudsman conducted a teleconference on August 26, 2008, titled "U Visa: One Year After the Interim Final Rule," in which the ombudsman fielded questions from stakeholders, including whether USCIS was "considering some flexibility in the final regulations by allowing the officer that worked on the case to sign the LEC."¹⁸¹ USCIS stated that it was reviewing the certification signatory requirement in response to the comments it had received.¹⁸² Informal softened approaches to this rigid regulatory requirement are not enough. Even if practitioners report successful certifications outside the agency head framework set out by the regulations, absent regulatory modification there is tremendous uncertainty. Revisiting the troubling aspects created by the certification interim regulations highlighted in sections III.A. and III.B would be an important first step to restoring the U visa's functionality as a victim protection mechanism.¹⁸³ These revisions should include an expanded and more flexible certification signatory framework, a softening of the ongoing cooperation requirement, and law enforcement appeal procedures where certifications are denied.

180. See Letter from Dan Kesselbrenner, Dir., Nat'l Immigration Project of the Nat'l Law Guild, to Dir., Reg. Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep't of Homeland Security, DHS Docket No. USCIS 2006-0069 (Nov. 15, 2007), <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480364dbf>; Letter from Lynn Neugebauer, Dir., Immigration Law Project, Safe Horizon to Chief, Reg. Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 16, 2007), <http://www.regulations.gov/search/Regs/contentStreamer?objectId=09000064803654a4&disposition=attachment&contentType=msw8>; Letter from Lori J. Elmer, Staff Attorney, Legal Aid of N.C., to Dir., Reg. Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 15, 2007), <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480365235>; Letter from Rona Karacaova, Battered Immigrant Project Manager, Legal Aid of N.C., to Dir., Reg. Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 15, 2007), <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=090000648036540f>; Letter from Ralston H. Deffenbaugh Jr., President, Lutheran Immigration and Refugee Serv., to Richard Sloan, Chief, Reg. Mgmt. Div., U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., DHS Docket No. USCIS 2006-0069 (Nov. 15, 2007), <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480364d83>.

181. Dep't of Homeland Sec., U Visa: One Year after the Interim Final Rule, Aug. 26, 2008, http://www.dhs.gov/xabout/structure/gc_1192724755499.shtm.

182. *Id.*

183. See, e.g., Pendleton, *supra* note 108, at 5 ("We hope that CIS will respond to the comments to the regulations highlighting the problem by removing from the regulations and form the restrictive requirements.").

B. *Enacting a Statutory Bypass Procedure*

Yet many of the underlying concerns are rooted in the statutory text, which requires the certification to make a *prima facie* case of U visa eligibility. Even with regulatory modifications, some of the problems highlighted in this article would still persist. Thus, amending the U visa enabling legislation to incorporate a certification bypass procedure would offer considerable flexibility to petitioners and restore a workable and more just framework.

The precedent exists for this result in the T visa petition for victims of trafficking.¹⁸⁴ T visas provide immigration protection to victims of severe forms of trafficking in persons.¹⁸⁵ T visas function similarly to U visas in that they provide immigration protection through the possibility of permanent resident status for victims of trafficking who cooperate in the prosecution and investigation of trafficking crimes.¹⁸⁶ Just as Congress recognized the importance of protecting victims of serious crimes with the U visa,¹⁸⁷ Congress recognized the importance of protecting victims of trafficking when it created the T visa.¹⁸⁸ A successful T visa petitioner must prove that she (1) is or has

184. The T visa and the U visa were legislated concurrently through the Victims of Trafficking and Violence Prevention Act of 2000. *See* Pub. L. No. 106-386, § 107(e), 114 Stat. 1464, 1474 (2000) (codified at 22 U.S.C. § 7105) (adding (T)(i) to Section 101(a)(15) of the Immigration and Nationality Act); Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1534 (2000) (codified at 8 U.S.C. § 1101) (adding U(i) to Section 101(a)(15) of the Immigration and Nationality Act).

185. 8 U.S.C. § 1184(o)(2) (2006) (allowing up to 5,000 visas to be granted per year to nonimmigrant aliens who are or have been victims of severe form of trafficking in persons under 8 U.S.C. § 1101(a)(15)(T)(i), as defined by 22 U.S.C. § 7102 8 (A)–(B) (2006) (defining “severe forms of trafficking in persons” as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery”)).

186. *See* 8 U.S.C. § 1255(l)(1); 8 C.F.R. § 245.23(a) (2009) (providing that successful T visa applicants may be granted adjustment of status to that of alien lawfully admitted for permanent residence); § 1255(m)(1); § 245.24(b) (providing that successful U visa applicants may be granted adjustment of status to that of alien lawfully admitted for permanent residence).

187. *See* Victims of Trafficking and Violence Prevention Act, § 1513(a)(2)(A)–(C) (“The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. . . . Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States. . . . Finally, this section gives the Attorney General discretion to convert the status of such nonimmigrants to that of permanent residents when doing so is justified on humanitarian grounds . . .”).

188. *See* 22 U.S.C. § 7101(a) (2006) (“The purposes of [the Trafficking Victims Protection Act] are to combat trafficking in persons . . . and to protect [the traffickers’] victims.”); §

been a “victim of a severe form of trafficking in persons;” (2) that she is “physically present in the United States;” and either (3) that she has “complied with any reasonable request for assistance in Federal, State or local law enforcement investigation or prosecution of acts of trafficking in persons,” unless she is unable to cooperate due to her age or psychological trauma; or (4) that she “would suffer extreme hardship involving unusual and severe harm upon removal.”¹⁸⁹ Applicants who need to prove that they have complied with reasonable requests for assistance¹⁹⁰ can prove it through other credible secondary evidence. Applicants may submit Form I-914, Supplement B, which is a Declaration of Law Enforcement Officer for Victim of Trafficking in Persons.¹⁹¹ USCIS considers this Supplement as primary evidence that the applicant meets the eligibility requirements, and it is strongly advised that applicants submit this supplement.¹⁹² The corollary certification is thus one

7101(b)(17)–(20) (“Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves. Additionally, adequate services and facilities do not exist to meet victims’ needs regarding health care, housing, education, and legal assistance, which safely reintegrate trafficking victims into their home countries. Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation. Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.”).

189. 8 U.S.C. § 1101(a)(15)(T)(i) (2006); 8 C.F.R. § 214.11(b) (2009).

190. § 214.11(a) (“*Reasonable request for assistance* means a reasonable request made by a law enforcement officer or prosecutor to a victim of a severe form of trafficking in persons to assist law enforcement authorities in the investigation or prosecution of the acts of trafficking in persons. The ‘reasonableness’ of the request depends on the totality of the circumstances taking into account general law enforcement and prosecutorial practices, the nature of the victimization, and the specific circumstances of the victim, including fear, severe traumatization (both mental and physical), and the age and maturity of young victims.”).

191. *Id.* (“*Law Enforcement Agency (LEA) endorsement* means Supplement B, *Declaration of Law Enforcement Officer for Victim of Trafficking in Persons* of Form I-914, *Application for T-Nonimmigrant Status*”).

192. Dep’t of Homeland Sec., U.S. Citizenship and Immigration Servs., Instructions for I-914, Application for T Nonimmigrant Status, <http://www.uscis.gov/files/form/i-914instr.pdf> (last visited April 19, 2010) [hereinafter Instructions for I-914] (“You are not required to file Form I-914, Supplement B, to prove your claim. However, the endorsement of a Federal, State, or local law enforcement authority is primary evidence that you are a victim of a severe form of trafficking in persons and that you have complied with any reasonable request for assistance These elements of your claim may be difficult to establish otherwise, and submission of Form I-914, Supplement B, is strongly advised.”)

way to prove cooperation with primary evidence—the form is the strongly advised way to do it—but it is not legislated as the exclusive way.¹⁹³ Petitioners may alternatively submit a statement or evidence demonstrating that “good faith attempts were made to obtain the LEA endorsement, including what efforts the applicant undertook to accomplish these attempts.”¹⁹⁴ This evidence may include the petitioner explaining her efforts to obtain the certificate unsuccessfully and otherwise proving that she testified, appeared in court, spoke with investigators, generally substantiating her cooperation.¹⁹⁵ This evidence may include her affidavit, witness transcripts, police reports, or news articles, for example.¹⁹⁶ A bypass framework consistent with the T visa model would provide more flexibility to petitioners and ensure that claims are adjudicated at the USCIS level, and partially insulate the certification process from irregularities and politics.

Indeed the precedent supporting this approach might even exist in the U visa regulatory evolution itself. The 2009 permanent adjustment regulations require petitioners to show ongoing cooperation.¹⁹⁷ The regulations encourage petitioners to show ongoing cooperation through a reissued certification,¹⁹⁸ but

193. Each applicant over the age of 15 must submit evidence fully establishing that he or she has complied with any reasonable request for assistance in the investigation or prosecution of acts of severe forms of trafficking in persons. § 214.11(h). Although considered “primary evidence,” an “LEA endorsement describing the assistance provided by the applicant is not *required* evidence.” § 214.11(h)(1) (emphasis added); *see also* § 214.11(f)(1) (“An LEA endorsement is not required.”).

194. § 214.11(f)(3) (detailing the kind of evidence applicants need to submit as secondary evidence if they cannot obtain an LEA endorsement (e.g., an original statement affirming victimization, credible evidence of victimization and cooperation that describes what the alien has done to report the crime to an LEA, affidavits, and statements about the availability of records regarding the crime)); *see also* Instructions for I-914, *supra* note 192, at 5 (“If you did not attempt to obtain the certification, you must explain why you did not.”)

195. Instructions for Form I-914, *supra* note 192, at 5.

196. *Id.*; § 214.11(f)(3).

197. 8 C.F.R. § 245.24(e) (2009) (“Continued assistance in the investigation or prosecution. Each applicant for adjustment of status under section 245(m) of the Act must provide evidence of whether or not any request was made to the alien to provide assistance, after having been lawfully admitted as a U nonimmigrant, in an investigation or prosecution of persons in connection with the qualifying criminal activity, and his or her response to such requests.”); § 245.24(b)(5) (requiring aliens not to have “unreasonably refused to provide assistance to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the alien was granted U nonimmigrant status, as determined by the Attorney General, based on affirmative evidence”).

198. § 245.24(e)(1) (“An applicant for adjustment of status under section 245(m) of the Act may submit a document signed by an official or law enforcement agency that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity, affirming that the applicant complied with (or did not unreasonably refuse to comply with) reasonable requests for assistance in the investigation or prosecution during the requisite period.

allow petitioners to show ongoing cooperation through other credible evidence alternatively.¹⁹⁹ These most recent regulations may indeed suggest amenability to more flexible methods of proof in the U visa framework.

Many of the problems highlighted in section III are rooted in inconsistent application of the governing legal rules at the local law enforcement level. Importantly, training and sensitizing law enforcement personnel is an important incremental step to restoring the balance that Congress intended. Congress enacted the U visa after legislative testimony revealed the experiences of immigrant women unprotected by the existing VAWA framework and the primary and secondary harms that these women experience.²⁰⁰ The regulatory framework would indeed be strengthened by the training and cultivation of informed law enforcement personnel who are well versed in the experiences of immigrant women and can contextualize “cooperation” within that broader framework.²⁰¹ Law enforcement personnel wield a tremendous amount of power in the U visa petition process, power that can be abused, misused, or not used at all. Training and sensitizing law enforcement to the precise limits of their power and the legal standards governing certification determinations stands to improve the regulatory framework, particularly the consistency in implementation and preserving the ultimate determination of the U visa merits for USCIS. Yet given the vast numbers of law enforcement swept into the U visa framework in federal and state jurisdictions nationwide and the high degree of personnel turnover, the prospect of training to overcome the misuse of the U visa that is occurring on the ground is untenable as a standalone workable solution. Thus, even with strong training and sensitization programs, a bypass procedure would still be necessary.

C. *Envisioning a New Immigrant Victim Paradigm*

While the reforms highlighted in sections A and B would improve the existing framework, the underlying issues highlighted in this article reveal a more pervasive and problematic tension. Federal legislation that simultaneously positions law enforcement as potential allies in the justice

To meet this evidentiary requirement, applicants may submit a newly executed Form I-918, Supplement B, ‘U Nonimmigrant Status Certification.’”).

199. § 245.24(e)(2) (“If the applicant does not submit a document described in paragraph (e)(1) of this section, the applicant may submit an affidavit describing the applicant’s efforts, if any, to obtain a newly executed Form I-918, Supplement B, or other evidence describing whether or not the alien received any request to provide assistance in a criminal investigation or prosecution, and the alien’s response to any such request.”).

200. See *supra* Section II.A (noting the legislative history considered).

201. See, e.g., Regina Graycar, *Telling Tales: Legal Stories About Violence Against Women*, 8 CARDOZO STUD. L. & LITERATURE 297, 309 (1996) (“Narratives will reveal another perspective, thereby bridging the experiential gap between storyteller and audience.”).

system with undocumented immigrant victims and potential adversaries in the justice system with undocumented persons suggests that a new paradigm may be in order entirely. Congress has repeatedly explored the underlying obstacles that undocumented immigrants face in working with law enforcement. Yet existing models have not proven effective in surmounting those obstacles. Immigration reform before the 111th Congress suggests some momentum toward revamping the framework that emerged following September 11, 2001. On December 15, 2009, for example, Congressman Luis V. Gutierrez (D-IL) introduced H.R. 4321, the Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009 (CIR ASAP), which proposes to repeal the 287(g) program and clarify that immigration enforcement authority lies exclusively with the federal government, among other reforms.²⁰² This is certainly a positive development to scale back the most recent immigration developments. To provide meaningful protections to victims of domestic violence, however, Congress should revisit the dual purposes framework in its conception. Humanitarian goals to protect victims of crimes in the United States may necessitate standalone recourse de-linking the law enforcement cooperation prong entirely. The U visa framework also reveals the staggering need for legal representation in U visa petitions. A new framework that is less grounded in diplomacy with law enforcement may empower victims to petition for relief on a pro se basis as well, thus expanding access to legal rights.

V. CONCLUSION

Check "yes" or "no." With the simple stroke of a pen, a select group of law enforcement personnel have the power to qualify undocumented victims of crimes to petition for U visa relief. The "no" box might just as well not exist on the certification form – indeed if law enforcement personnel check "no," they more than likely ensure that the petitioner's U visa case is defeated. Congress legislated this gatekeeper function for law enforcement. It did so, however, with the express purpose of simultaneously strengthening law enforcement's ability to investigate and prosecute crimes while offering protection to victims of these crimes.²⁰³

A decade after Congress created the U visa classification, the balance has shifted dramatically. Elevating the certification power to the agency head level has politicized the certification and limited access for immigrant women who benefit generally from the involvement of officers more experienced in interacting with community policing or immigrant populations or domestic

202. H.R. 4321, 111th Cong. (2009).

203. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53,015 (Sept. 17, 2007).

crimes. Imposing an “ongoing cooperation” requirement further empowers law enforcement to control the relief available to victims without the necessary protections to ensure that “cooperation” is considered in the context of immigrant victims of crimes. These regulatory restrictions are problematic when considered in the current legal, political, and social framework in which local law enforcement, at the invitation of the federal government, is increasingly central to both criminal and civil immigration enforcement. Local immigration in a post-9/11 world has fatally altered the symbiotic relationship that Congress envisioned in the U visa framework. All of the obstacles together heighten and magnify the precise undocumented immigrant fears and hesitations that necessitated the U visa in the first instance. Consequently, considering all of these factors together, the dual purposes of the U visa classification are thwarted.

To reconcile the legislative purpose and restore the balance of power, USCIS could implement a more flexible certification framework in the regulations and eliminate or define more narrowly the “ongoing cooperation” requirement. A statutory bypass procedure allowing petitioners to circumvent the certification process where they face a non-compliant law enforcement signatory, following the T visa model, would also be an important step to achieve the dual purposes along with additional training and sensitization of law enforcement personnel. Finally, it may be necessary in the context of federal immigration reform and the reauthorization of VAWA to revisit the paradigm for protecting immigrant victims of domestic violence crimes more holistically.

